Supreme Court of the United States

October Term, 1967

No. 823

UNIFORMED SANITATION MEN ASSOCIATION, INC., *et al.*,

Petitioners,

against

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, *et al.*,

Respondents.

PETITIONERS' REPLY BRIEF

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January 8, 1968.

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Even as phrased in respondents' brief, the questions presented herein are important ones, never squarely decided by this Court although foreshadowed by the decisions upon which petitioners rely. Respondents, however, have interpolated into each question an element not fairly in this case. In fact, (1) petitioners were dismissed for asserting their constitutional privilege against self-incrimination, not their failing to explain or justify its invocation; and (2) the issue is not whether wiretap evidence was offered against petitioners in their disciplinary proceedings, but whether it led to their investigation, suspension and dismissal.

I

Petitioners were dismissed for asserting their constitutional privilege, not for failing to explain its invocation.

The respondents, unlike the court below, argue that the petitioners were dismissed, not for assertion of the privilege, but for failure to explain it. This, however, is not what the New York City Charter contemplated, nor what the complaint alleged, nor what actually occurred. The Charter speaks in unequivocal terms, and makes assertion of the privilege or the refusal to waive immunity an absolute ground for dismissal.

The respondents rely (Br. p. 8) upon the lower court decision in *Gardner* v. *Murphy*, 46 Misc. 2d 728 (Sup. Ct., N.Y. Co. 1965) for the proposition that dismissal from public employment based solely upon the invocation of the privilege is forbidden by the Constitution but that the assertion of the privilege may legitimately serve as a "prima facie" basis for dismissal. This is plainly in conflict with what the Court has said about the privilege in *Ullman* v. *United States*, 350 U.S. 422 and *Slochower* v. *Board of Education*, 350 U.S. 551.

The respondents also assert that since a hearing, purportedly under Section 1123 of the Charter, was held petitioners have been afforded a substantive administrative remedy and that at such a hearing, petitioners had "the right to refuse to answer" but not the "right to fail to explain or justify [their] refusal." (Br. p. 11). However, respondents do not answer the question of how, at such a hearing, one can explain the invocation of the constitutional privilege without surrendering it. As the Court stated in *Hoffman* v. *United States*, 341 U.S. 479, 486-487:

> "if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

Clearly, petitioners were not required to justify their invocation of the privilege at such a hearing.

In any event, respondents' argument ignores the fact, which the court below recognized, that the petitioners "were dismissed from their employment for refusing to answer

questions" (Pet. 12a), not for refusing to justify the invocation of their privilege.

Respondents' casual reference to the inquiry "by appropriate City officials" (Br. p. 11) skims over the fact that it was not an employer's inquiry with respect to the fulfillment of an employee's duties that is involved here, but an inquiry by a criminal investigating agency which, as such, had secured a search warrant to wiretap under Section 813-a of the New York Code of Criminal Procedure, and had formally warned the employees of their constitutional privilege, their right to counsel, etc. (R. 7a-8a). Certainly, no one would suggest that the grand jury's inquiry in which the refusal to waive immunity by three of the petitioners led to their discharge was an inquiry by an employer into qualifications for employment.

The respondents suggest that this Court in *Spevack* v. *Klein*, 385 U.S. 511, "did not reach" the question presented in this petition for certiorari. They cite Mr. Justice Fortas' concurring opinion to emphasize their point (Br. p. 10).[1] The very fact that this Court was not required to reach this important question in that case is a reason for deciding it in the instant one where the issue is squarely presented.[2]

Respondents rely here (Br. p. 7) upon three cases in which a closely divided Court upheld the dismissal of public employees who failed to answer questions put by their employers. None of these cases involved a statutory mandate that assertion of the constitutional privilege

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[1] In *Stevens* v. *Marks*, 383 U.S. 234, the Court had earlier recognized, at p. 243, that the issue was an open one, still to be resolved.

[2] The Corporation Counsel has elsewhere recognized that "all five of the Supreme Court Justices in the majority in those two cases [*Garrity* v. *New Jersey*, 385 U.S. 493 and *Spevack* v. *Klein*, 385 U.S. 511] have left open the question which petitioner argues has been decided in his favor." Brief of the Corporation Counsel in *Gardner* v. *Broderick*, 20 N.Y. 2d 227.

against self-incrimination requires automatic dismissal from employment.[3]

Lerner v. *Casey*, 357 U.S. 468, upheld a statutory mandate that persons "of doubtful trust and reliability" be dismissed from a so-called security agency. The Court held that the refusal to answer certain questions justified "a finding of doubtful trust and reliability". The Court specifically pointed out, however, at p. 477, that the employee's discharge "was not based on the fact that the employee had asserted Fifth Amendment rights". In addition, the Court noted, at p. 478, that "the federal privilege against self-incrimination was not available to appellant through the Fourteenth Amendment" in the state investigation, a statement subsequently overruled by the decision in *Malloy* v. *Hogan*, 378 U.S. 1.

In *Beilan* v. *Board of Education of Philadelphia*, 357 U.S. 399, 400, the Court upheld a school teacher's dismissal for "incompetency" where the "incompetency" was evidenced by the teacher's refusal "to confirm or refute information as to the teacher's loyalty and his activities in certain allegedly subversive organizations".

These cases do not uphold the validity of a statute requiring the automatic dismissal of a public employee who asserts his constitutional privilege against self-incrimination.

II

Petitioners' dismissal from employment resulted from wiretapping which was illegal and in violation of petitioners' constitutional rights.

Respondents first argue that "no evidence derived from the interceptions was offered against the petitioners in any subsequent proceedings" (Br. p. 2). This careful formulation overlooks the result reached in the second *Nardone*

[3] One of those cases, *Nelson* v. *County of Los Angeles*, 362 U.S. 1, was discussed on page 9 of the petition for certiorari in this case.

case, namely, that use of the fruits of illegal wiretapping is prohibited by Section 605 of the Federal Communications Act, *Nardone* v. *United States,* 308 U.S. 338. In the instant case, the complaint alleges that respondents' investigation and disciplinary actions against petitioners were the result of such wiretapping (R. 7a). The affidavits show that the wiretapping was the foundation stone of the interrogation (R. 18a, 72a).

Constitutional questions aside, violation of a federal statute—particularly where it constitutes a crime—does make the dismissal unlawful. The refusal of this Court in *Schwartz* v. *Texas,* 344 U.S. 199, to reverse a state criminal conviction based upon wiretapping was the result of a belief that Congress in enacting Section 605 did not intend to impose a rule of evidence upon state courts. In *Benanti* v. *United States,* 355 U.S. 96, 101, the Court reiterated this view, stating: "[D]ue regard to federal-state relations precluded the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear indication to that effect." In *Stefanelli* v. *Minard,* 342 U.S. 117, 120, the Court had elaborated further on this theme when, in a federal suit to enjoin the use in a state criminal trial of evidence alleged to have been secured by an unlawful state search, it said:

> "Here the considerations governing that discretion touch perhaps the most sensitive source of friction between States and Nations, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the states."

The policy considerations precluding federal interference with state criminal prosecutions do not apply to dismissals from city employment based upon violations of federal law.

Respondents' argument that wiretapping is supported by New York's "constitutional and legislative policy"

(Br. p. 13) ignores the issue of the violation of petitioner's rights under the United States Constitution. It must be reemphasized that in *Berger* v. *New York,* 388 U.S. 41, this Court struck down New York's statute implementing that policy. The court below was wrong—as are respondents—in suggesting that *Berger* was limited to "the circumstances there presented" (Pet. 14a).

Respondents next argue (Br. p. 14) that a "telephone leased by the City, on City-owned premises, tapped by a City official in the course of his investigative duties" is not a "constitutionally protected area, within the purview of the Fourth Amendment protection". Whatever doubts there may have been as to what constitutes a "constitutionally protected area" have been laid to rest by this Court's recent opinion in *Katz* v. *United States,* — U.S. —, 36 U.S.L. Week 4080 (Dec. 19, 1967). There, in reversing a defendant's conviction based upon evidence secured by the use of a listening device attached to the outside of a telephone booth from which the defendant was making a call, the Court departed from the narrow view of the Fourth Amendment which governed the decisions in such cases as *Olmstead* v. *United States,* 277 U.S. 438, and *Silverman* v. *United States,* 365 U.S. 505. The Court declared, at 36 U.S.L. Week 4081:

> "For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of a Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

United States v. *Collins,* 349 F.2d 863 (2d Cir. 1965), *cert. denied,* 383 U.S. 960, is not to the contrary. There, the search was limited to specific and identifiable objects, namely, the defendant's office desk and jacket. This is quite different from wiretapping a telephone where the

wiretap is not limited to conversations relating to city business and there is a "roving commission" to search out all telephone conversations;[4] see *Berger* v. *New York*, *supra*, at 59.

The suggestion (Br. p. 15) that the Commissioner of Investigation was investigating the "misuse of City property" is not a fair description of what occurred here. The Commissioner of Investigation was not interested in the misuse of a telephone, but in securing evidence of crime from the telephone conversations.

III

This case presents two questions of continuing importance which require early resolution by the Court. One question, that of the privilege against self-incrimination, is reflected by the pending jurisdictional statement in *Gardner* v. *Broderick*, October Term, 1967, No. 635. The second question is whether wiretapping, engaged in by city officials in violation of a federal statute and the Fourteenth Amendment, can lawfully lead to the dismissal of an employee from public employment.

The instant petition has the advantage of presenting both issues to this Court upon a very short record involving no disputed issues of fact. Counsel is prepared to brief and argue the case upon short notice. In the light of the fact that it presents two separate and important questions of constitutional law, it is respectfully suggested that full argument be permitted in this case even if jurisdiction is noted in *Gardner* or other cases of a similar nature.

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[4] Respondents have not complied with petitioners' requests for copies of the application for the wiretap order and the order itself.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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